Nam Fatt Corp Bhd & Anor v Petrodar Operating Co Ltd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S-22–315 OF 2010
LEE SWEE SENG JC
30 AUGUST 2010

Civil Procedure — Injunction — Ad interim injunction — Application to set aside — Whether serious questions to be tried shown — Whether questions raised were frivolous or vexatious — Whether ad interim injunction to remain until inter partes hearing of interim injunction

Civil Procedure — Jurisdiction — Unconditional appearance and affidavit in reply filed to ad-interim injunction — Whether submission to jurisdiction — Whether jurisdiction of court surrendered by mere objection to ad interim injunction

This was an inter partes hearing of an application in encl 3 by the plaintiffs for an interim injunction to restrain the first defendant from receiving the money it demanded in respect of a performance guarantee ('PG') and to restrain the second defendant from paying out the guarantee money. The second plaintiff was a subsidiary of the first plaintiff. The second plaintiff entered into a contract with the first defendant to build, construct and commission a 1000km pipeline and pumping facilities for the passage of crude oil through it for an agreed contract sum of US$180m ('the project') through a joint-venture company. The first defendant is an off-shore company incorporated in the British Virgin Islands, having its office in Khartoum. The second defendant is an off-shore bank in Labuan with a place of business in Kuala Lumpur. The first plaintiff had, at the request of the second plaintiff, provided the second defendant with the necessary security for the issuance of the PG for US$18m in favour of the first defendant. The parties agreed that Sudan law shall be the applicable law governing the contract as well as the PG. The project was substantially completed. The second plaintiff however complained that there were repeated attempts to delay and drag the payments due to them from the first defendant. There was also the complaint that the first defendant had refused to approve any variation order even though those variations were at the orders of the first defendant. When things came to a halt, the first defendant made a demand on the second defendant to pay the sum of US$18m under the PG. However, the claims of the contractor for variation order and costs and expense were met by the principal's claim for liquidated and ascertained damages ('LAD') and cost of rectification as well besides calling upon payment

under the PG which was procured at the commencement of the construction. The issues for the determination of this court was whether the PG could be paid out when there was allegation of fraud and unconscionable conduct on the part of the beneficiary of the PG that is the first defendant and that this court having granted an ad interim order to that effect could now proceed to affirm the injunction given or to dismiss the plaintiffs' application for such an injunction.

Held, dismissing the application in encl 3:

(1) The plaintiffs were clearly estopped from denying that the PG was unconditional. The contract had been entered into in 2004 where the second plaintiff agreed to provide an 'approved, unconditional and irrevocable on-demand bank guarantee …' and the parties had proceeded on that understanding throughout the years. The first mention of the bond being conditional was only made by the plaintiffs in 2010. Further, the second plaintiff had agreed that they would bring to the immediate attention of the first defendant any discrepancy between the contract and the law of Sudan. In the circumstances, the plaintiffs could not now take advantage of what they now say is the position of the law of Sudan which apparently allowed them to restrain the sum guaranteed from being paid out under the PG. To allow that would be inequitable. Hence there were no serious questions to be tried (see para 18).

(2) The allegations of fraud by the plaintiffs were more in the nature of disputes over interpretation of the contract and the material as adduced by affidavit evidence did not lend itself to the only reasonable inference of fraud. On the facts, the demand on the PG had been validly made and there was nothing forthcoming from the plaintiffs that they would be extending the PG pending negotiation. If the demand was not made the PG would have expired. Failure of the second plaintiff to renew the PG was a breach of its contractual obligations (see paras 36 & 37).

(3) It is trite that the burden is on the plaintiffs to adduce evidence of irreparable harm. Nowhere was it stated that the payment out of the PG would cause insolvency of the plaintiffs (see para 41).

(4) The balance of convenience was heavily tipped in favour of the first defendant as performance bonds are the lifeblood of commerce, a commercial bargain struck by both parties to provide for times of risk and one which the courts were reluctant to interfere (see para 44).

[Bahasa Malaysia summary

Ini merupakan pendengaran inter partes permohonan dalam lampiran 3 oleh plaintif-plaintif untuk injunksi interim untuk menghalang defendan pertama daripada menerima wang yang dituntut berikutan jaminan prestasi ('JP') dan untuk menghalang defendan kedua membayar wang jaminan. Plaintif kedua

merupakan subsidiari plaintif pertama. Plaintif kedua menandatangani kontrak dengan defendan pertama untuk mendirikan, membina dan memasang 1000km saluran paip dan kemudahan pam untuk saluran minyak mentah bagi jumlah kontrak yang dipersetujui US$180 juta ('projek') melalui syarikat usahasama. Defendan pertama merupakan syarikat pesisir pantai yang ditubuhkan di British Virgin Islands, berpejabat di Khartoum. Defendan kedua merupakan bank pesisir pantai di Labuan dan pusat perniagaannya di Kuala Lumpur. Plaintif pertama, atas permintaan plaintif kedua, memperuntukkan defendan kedua dengan jaminan yang berpatutan bagi pengeluaran JP tersebut untuk US$18 juta bagi pihak defendan pertama. Pihak-pihak bersetuju bahawa undang-undang Sudan harus menjadi undang-undang terpakai bagi kontrak tersebut dan juga JP. Projek tersebut sebahagian besarnya hampir siap. Plaintif kedua walau bagaimanapun mengadu bahawa terdapat percubaan berkali-kali untuk melengah-lengahkan pembayaran daripada defendan pertama. Juga terdapat aduan bahawa defendan pertama enggan meluluskan apa-apa perintah perubahan walaupun perubahan tersebut adalah atas arahan defendan pertama. Apabila kerja-kerja terhenti, defendan pertama membuat tuntutan kepada defendan kedua untuk membayar sejumlah US$18 juta di bawah JP tersebut. Walau bagaimanapun, tuntutan-tuntutan kontraktor untuk perintah-perintah perubahan dan kos telah dipenuhi dalam tuntutan utama bagi jumlah tertentu dan menentukan ganti rugi ('LAD') dan juga kos pembaikan, selain daripada meminta bayaran di bawah JP yang diperolehi apabila bermulanya kerja-kerja pembinaan itu. Isu-isu untuk diputuskan oleh mahkamah ini ialah sama ada JP tersebut boleh dibayar apabila terdapatnya tuduhan fraud dan kelakuan yang tidak berpatutan di pihak benefisiari JP, iaitu defendan pertama dan bahawa mahkamah ini, setelah memberikan perintah ad interim sedemikian, kini boleh meneruskan untuk mengesahkan injunksi yang diberikan atau menolak permohonan plaintif-plaintif untuk injunksi tersebut.

Diputuskan, menolak permohonan dalam lampiran 3:

(1) Plaintif-plaintif jelas diestop daripada menafikan bahawa JP tersebut tidak bersyarat. Kontrak telah ditandatangani pada 2004 di mana plaintif kedua bersetuju untuk membekalkan 'approved, unconditional and irrevocable on-demand bank guarantee …' dan pihak-pihak telah meneruskan atas persefahaman tersebut selama ini. Hal perkara bon tersebut bersyarat pertama kali dibangkitkan oleh plaintif-plaintif pada 2010. Selanjutnya, plaintif kedua telah bersetuju bahawa mereka akan membawa kepada perhatian segera defendan pertama sebarang percanggahan antara kontrak tersebut dan undang-undang Sudan. Dalam keadaan ini, plaintif-plaintif, kini tidak boleh mengambil kesempatan dengan mengatakan ia merupakan undang-undang Sudan yang mana membenarkan mereka menahan jumlah yang telah dijamin

daripada dibayar di bawah JP. Untuk membenarkan perkara sedemikian adalah tidak saksama. Maka, tiada persoalan serius untuk dibicarakan (lihat perenggan 18).

(2) Tuduhan-tuduhan fraud oleh plaintif-plaintif lebih kepada sifat pertikaian terhadap tafsiran kontrak dan material yang dikemukakan menerusi keterangan afidavit tidak menyokong inferens fraud. Atas fakta-fakta, tuntutan ke atas JP telah dibuat dengan sah dan tiada apa-apa daripada plaintif-plaintif bahawa mereka akan melanjutkan JP tersebut sementara menunggu perbincangan. Jika tuntutan tidak dibuat, JP tersebut akan tamat tempohnya. Kegagalan plaintif kedua memperbaharui JP adalah pelanggaran kewajipan-kewajipan kontraktualnya (lihat perenggan 36 & 37).

(3) Adalah sudah mantap bahawa beban di pihak plaintif-plaintif untuk mengemukakan keterangan kerugian yang tidak dapat ditebus. Ia tidak dinyatakan di mana-mana bahawa bayaran daripada JP akan mengakibatkan ketaksolvenan plaintif-plaintif (lihat perenggan 41).

(4) Imbangan kemudahan nyata berpihak kepada defendan pertama kerana bon-bon prestasi adalah darah daging dunia dagang, suatu persetujuan komersial yang terikat antara pihak-pihak untuk menghadapi masa-masa berisiko dan yang mana mahkamah-mahkamah agak keberatan untuk campur tangan (lihat perenggan 44).]

Notes

For cases on injunction in general, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3135–3954.

For cases on jurisdiction in general, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4808–4910.

Cases referred to

Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1981] 3 All ER 577, CA (refd)

Attica Sea Carriers Corporation v Ferrostaal Poseidon Bulk Reederai GMBH, The Puerto Buitrago [1976] 1 Llyod's Rep 250, CA (refd)

Bains Harding (Malaysia) Sdn Bhd v Arab-Malaysian Merchant Bank & Ors [1996] 1 MLJ 425, HC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Cygal Bhd v Bandar Subang Sdn Bhd [2004] 3 CLJ 67, CA (refd)

Ekovest-KMZ-Dragages Sdn Bhd v HSBC Bank Malaysia Berhad & Anor [2003] MLJU 364, HC (refd)

Elcorp Resources Sdn Bhd & Anor v Perbadanan Putrajaya & Anor [1998] MLJU 555; [1999] 1 CLJ 558, HC (refd)

Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149, SC (folld)
Focal Asia Sdn Bhd & Anor v Raja Noraini binti Raja Datuk Nong Chik & Anor [2009] 1 LNS 913, HC (refd)
Gemawan Bina Sdn Bhd lwn Ikatan Wirausaha Sdn Bhd [1998] MLJU 310, HC (refd)
Hemis Interco BV Sdn Bhd v Syarikat Pembenaan Hashbudin (M) Sdn Bhd [1986] 1 CLJ 562, HC (refd)
Hisniaga Jaya Sdn Bhd v Dua Masa Construction Sdn Bhd [1986] 1 MLJ 245; [2009] 1 LNS 558, HC (refd)
HSH Engineering & Construction Sdn Bhd v Belton Properties Sdn Bhd & Anor [2001] MLJU 85; [2001] 2 CLJ 186, HC (refd)
IJM Construction Sdn Bhd v Cleveland Development Sdn Bhd [2002] 3 MLJ 516; [2001] 6 CLJ 220, HC (refd)
Kejuruteraan Awam Cang Ceng (M) Sdn Bhd v Standard Chartered Bank [1283] MD 2; [1991] 3 CLJ 2502, HC (refd)
Kheng Bee Construction Sdn Bhd (280541-X) v Standard Warehousing Sdn Bhd (439814-M) [2000] MLJU 767, HC (refd)
Kirames Sdn Bhd v Federal Land Development Authority [1991] 2 MLJ 198, HC (refd)
LEC Contractors (M) Sdn Bhd (formerly known as Lotteworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor [2000] 3 MLJ 339; [2000] 3 AMR 2625, CA (folld)
Luminous Construction Sdn Bhd v RHB Bank Bhd & Ors [2010] MLJU 212; [2010] 1 LNS 219, HC (refd)
Mayekawa MFG Co Ltd & Anor v Haisan & Sons Sdn Bhd & Ors [2005] 1 LNS 325, HC (refd)
Murni Builders Sdn Bhd v Legends Golf & Country Resort Bhd & Anor [1999] MLJU 441, HC (refd)
Nafas Abadi Holdings Sdn Bhd v Putrajaya Holdings Sdn Bhd & Anor [2004] MLJU 148, HC (refd)
Nam Fatt Corp Bhd & Anor v Petrodar Operating Co Ltd & Anor [2010] MLJU 938; [2010] 9 CLJ 732, HC (refd)
Nishimatsu-Corpro Construction (M) Sdn Bhd v Dorsett Regency Hotel (M) Sdn Bhd [2001] MLJU 143, HC (refd)
Pasukhas Construction Sdn Bhd & Anor v MTM Millenium Holdings Sdn Bhd & Anor [2009] 8 MLJ 1; [2009] 6 CLJ 480, HC (refd)
Patel Holdings Sdn Bhd v Estet Pekebun Kecil & Anor [1989] 1 MLJ 190, HC (refd)
Perkasa Duta Sdn Bhd v Perbadanan Kemajuan Negeri Selangor [2002] MLJU 20; [2002] 2 CLJ 307, HC (refd)
Radio & General Trading Co Sdn Bhd, The v Wayss & Freytag (M) Sdn Bhd [1998] 1 MLJ 346, HC (refd)
RD Harbottle (Mercantile) Ltd & Anor v National Westminster Bank Ltd & Ors [1977] 3 WLR 752, QBD (refd)

Satriadesa Corporation Sdn Bhd v Tenaga Nasional Bhd [2009] MLJU 1404; [2010] 4 CLJ 877, HC (refd)
Siemens Integra Transportation System Sdn Bhd & Anor v EKD Construction Sdn Bhd & Anor [2003] MLJU 475, HC (refd)
Transfield Projects (M) Sdn Bhd & Anor v Malaysian Airlines Systems Bhd [2000] 7 MLJ 583; [1999] 4 CLJ 827, HC (refd)
United Trading Corporations SA and Murray Clayton Ltd v Allied Arab Bank Ltd & Ors [1985] 2 Lloyd's Report 554, CA (refd)

Legislation referred to

Companies Act 1965 s 176
Evidence Act 1950 s 115
Specific Relief Act 1950 s 54(j)

Tee Geok Hock (N Rajentharan with him) (GH Tee & Co) for the plaintiffs.
Kamraj Nayagam (Janice Tay with him) (Skrine) for the first defendant.
Sean Yeow (Lee Hishamuddin Allen Gledhill) for the second defendant.

Lee Swee Seng JC:

PROLOGUE

[1] The facts of this case have largely been set out in the case of *Nam Fatt Corp Bhd & Anor v Petrodar Operating Co Ltd & Anor* [2010] MLJU 938; [2010] 9 CLJ 732 and are repeated here to the extent as they may be relevant to the inter partes hearing of an application in encl 3 by the plaintiffs for an interim injunction to:

(a) restrain the first defendant from receiving the money it demanded in respect of the performance guarantee dated 22 February 2010 issued by the second defendant; and

(b) restrain the second defendant from paying out the guarantee money.

[2] Central to the issue above is whether the performance guarantee ('PG') can be paid out when there is allegation of fraud and unconscionable conduct on the part of the beneficiary of the PG that is the first defendant herein and that this court having granted an ad interim order to that effect can now proceed to affirm the injunction given or to dismiss the plaintiffs' application for such an injunction.

[3] At the hearing of the first defendant's application to set aside the ad interim injunction I had held that on the surface at least I was satisfied that there are serious questions for trial and that a more mature consideration of this issue of a serious question to be tried can be further had at the hearing at the inter partes stage.

[4] The time has now come for the hearing at the inter partes stage and for that more mature consideration alluded to.

PARTIES

[5] As can be gleaned from the case of *Nam Fatt Corp Bhd* the first plaintiff is a public listed company listed with Bursa Malaysia and now under PN17. The second plaintiff is a subsidiary of the first plaintiff and it entered into a contract ('the contract') with the first defendant to build, construct and commission a 1000km pipeline and pumping facilities for the passage of crude oil through it for an agreed contract sum of US$180m under an 'engineering, procurement, construction and commissioning of pumping facilities contract' ('the project') through the vehicle of a joint-venture company called Bentini NF Energy JV; a joint-venture company between the second plaintiff and Bentini SpA.

[6] The first defendant is an off-shore company incorporated in British Virgin Islands and having its office in Khartoum. The second defendant is an off-shore bank in Labuan with a place of business in Kuala Lumpur.

[7] The first plaintiff had at the request of the second plaintiff provided the second defendant with the necessary security for the issuance of a performance guarantee ('PG') for US$18m in favour of the first defendant in the standard form prescribed in the contract. The security furnished by the first plaintiff in favour of the second defendant were a fixed deposit of RM20m, a corporate guarantee and indemnity and a piece of land.

PROBLEM

[8] The project was substantially completed though not without its complications and challenges. The complaint of the second plaintiff was that there were repeated attempts to delay and drag the payments due to them from the first defendant. There was also the complaint that the first defendant had refused to approve any variation order even though those variations were at the orders of the first defendant. There were various negotiations but to no avail and when things came to the halt the first defendant made a demand on the second defendant to pay the sum of US$18m under the PG.

[9] As can be anticipated, the claims of the contractor for variation order and cost and expense were met by the principal's claim for liquidated and ascertained damages ('LAD') and cost of rectification as well besides calling upon payment under the PG which was procured at the commencement of the construction.

[10] The parties have agreed that Sudan law shall be the applicable law governing the contract as well as the PG.

[11] The first defendant sent their representative to the second defendant's office in Kuala Lumpur for a formal demand to be made.

PRINCIPLES

[12] The plaintiffs' counsel submitted that there is:

(a) More than a bona fide serious issue to be tried as at the very least there is a dispute as to what is Sudan law with respect to a demand made on a PG;

(b) Fraud and unconscionability on the part of the first defendant in the contract such as to invalidate their call on the PG;

(c) Knowledge of the second defendant now being made aware of the fraud and unconscionable conduct on the part of the first defendant such that the second defendant would be a party to the fraud if payment under the PG is made out; and

(d) The balance of convenience favouring the plaintiffs because irreparable damage and/or harm would be caused and the plaintiffs' reputation as a company would be damaged.

BONA FIDE ISSUES TO BE TRIED

[13] The plaintiffs submitted that under the law of Sudan which governs the PG, Shariah principles are applicable in interpreting the PG. It was submitted that the PG is a conditional guarantee and that the first defendant must prove breach and loss before it can demand or receive money under the guarantee. As this has not been proved by the first defendant they are not entitled to receive the payment. Likewise too the second defendant (the surety) must ascertain that the breach and loss have been proved before it can make any payment under the PG.

[14] The plaintiffs' counsel further submitted that from the expert opinion of one Mr Abdul Mahmoud Salih Mahmoud, a Sudanese lawyer of more than 40 years of legal experience in various capacities, it can be summarised and stated that:

(a) As Sudanese law requires the surety to ascertain the condition, restriction and description tied to the payment, and coupled with Sharia principles that prohibits unjust enrichment, it is practically impossible to perceive of a guarantee which qualify as an on-demand guarantee under Sudanese law; and

(b) The effect of the application of Shariah principles in the context of the commercial law of Sudan is such that the owner is not allowed by law to make a call on the guarantee without proof of default or damages, losses or expenses sustained due to default or amount of the damages, losses or expenses sustained thereby.

[15] The plaintiffs has also fortified the above opinion with another opinion of one Prof Dr Samy Abdelbaki, the assistant professor in Commercial, Maritime and Aviation Law, Faculty of Law, Cairo University where the said Dr Samy said, inter alia, that a letter of guarantee is a Kafala contract under Islamic jurisdiction of Shariah principles whereby only confirmed liability of a guaranteed person creates a confirmed liability on the guarantee. If that were the position of Sudan law then I must say it is poles apart with respect to what is generally understood as the law with respect to PG and the principle of sanctity of bonds. Fearing that an element of uncertainty might be introduced by reference to the law of Sudan, the parties had agreed in cl 13.2 of the contract under the title of 'Laws to be Observed' that:

> If the CONTRACTOR (the second plaintiff here) discovers any discrepancy or inconsistency between the CONTRACT and the LAWS, the CONTRACTOR shall immediately report the same in writing to the OWNER (the first defendant here) setting out his proposals for overcoming the discrepancy or inconsistency (as the case may be). In the event that the OWNER disagrees with the proposals made by the CONTRACTOR under this Condition 13.2, he will advise the Contractor and will issue instructions as to how the discrepancy or inconsistency is to be overcome. The implementation of the CONTRACTOR'S proposals or the instruction of the OWNER (as the case may be) shall be undertaken by the CONTRACTOR at his own cost and without any right to an extension of time. (the words in italics are added to clarify the parties referred to).

[16] The second defendant's counsel submitted that the second plaintiff knew in 2006 about the Sudanese law argument and yet it did not immediately disclose that to the first defendant despite having a clear contractual obligation to do so. I find merits in that argument. I also agree with the first defendant that instead and even as late as March 2010, the second plaintiff unequivocally confirmed that they have provided the first defendant with an unconditional bond and asserted that the first defendant was always in possession of a valid bond.

[17] In order not to lose out and to counter the so-called expert opinion of the plaintiffs, the first defendant has exhibited the opinion of their experts, Dr Mohamed El Fat and Dr Abdalla Idris Mohamed. The former is the Head of Department of Commercial Law, Faculty of Law, University of Khartoum and the latter is a former Dean, Faculty of Law, University of Khartoum and a past General Counsel and Director of the Legal Department of the Islamic

Development Bank and a current Fellow of the Faculty of Law, University of Kartoum. Their opinion reads, inter alia:

> The terms of the Performance Guarantee leaves no room for doubt that it is an unconditional on demand Guarantee. Clause 2 of the Performance Guarantee stipulates that 'the surety *shall upon demand* made by the Owner in writing and *without proof or conditions* satisfy and discharge any damages, losses, charges, costs or expenses sustained by the Owner thereby up to the Guaranteed Sum'. What Mr Salih calls 'conditions' are stipulations that reinforce the independent and unconditional nature of the guarantee. The happening of any of the events specified in clause 3 of the Performance Guarantee will not affect the unconditional nature of the guarantee and will not discharge the Surety from his payment obligation. Furthermore, if it is true that the Performance Guarantee is conditional, it must follow that the Contractor is in breach of his obligation under clause 15.2 of the Conditions of Contract to procure, for the benefit of the Owner, an approved, *unconditional and irrevocable on-demand guarantee*. (Emphasis added.)

[18] As can be seen the experts of both the plaintiffs and the first defendant are at diametrically opposite poles and the twain shall never meet. The court at this stage does not have to decide which of the two opinions to accept as the plaintiffs are clearly estopped from denying that the PG is unconditional. The contract was entered into in *2004* where the second plaintiff agreed to provide an 'approved, unconditional and irrevocable on-demand bank guarantee …' and the parties had proceeded on this understanding throughout the years and that the first mention of the bond being conditional was only made by the plaintiffs in *2010* before this court.

[19] Under s 115 of the Evidence Act 1950 it is provided under the title 'Estoppel' as follows:

> When a person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

[20] The Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 held that the doctrine of estoppel was of general application.

[21] Counsel for the first defendant further referred the court's attention to *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577 which in dealing with the conflicting interpretation on a bank guarantee, sheds some light into how a

court should give effect to the arrangement that parties are no doubt clear as to what they wanted irrespective of whether there was a mistake on both parties or just one:

> The judge put this telling point: suppose that Amalgamated knew that the bank were under a mistake, and did not tell the bank but took advantage of it for their own benefit. Could Amalgamated then take advantage of it? Clearly not. Then what difference does it make that Amalgamated were under the same mistake? If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affidavits, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.

[22] Here, the parties knew as businessmen what they were entering into in that the second plaintiff is to procure from the second defendant an 'approved, unconditional and irrevocable on-demand bank guarantee …' and the parties had proceeded on this understanding. The plaintiffs cannot now take advantage of what they now say is the position of the law of Sudan which apparently allows them to restrain the sum guaranteed from being paid out under the PG. To allow that would be inequitable when the second plaintiff had agreed that they would bring to the immediate attention of the first defendant any discrepancy between the contract and the law of Sudan. Indeed the plaintiffs are stopped from raising this novel argument that the unconditional on-demand guarantee is not a creature known under the law of Sudan.

[23] I find much force in the first defendant's submission that the plaintiffs are clearly not entitled to the equitable remedy of injunction as they have not come before the court with clean hands. Whilst the Sudanese opinion was obtained way back in 2006 the plaintiffs have maintained complete silence until the call on the PG was made in 2010. In the interim the PG had been renewed not once, but twice and each time asserting that it was a fulfillment of their obligation under cl 15.2 of the contract which is to procure for the benefit of the first defendant an approved, unconditional and irrevocable on-demand bank guarantee as a performance guarantee. For the plaintiffs to now argue that though the first defendant asked for such a guarantee but that there is no such guarantee under the law of Sudan and to use that argument to restrain payment under the PG by way of an injunction would be nothing less than bad faith by the plaintiffs. The plaintiffs are clearly seeking escape routes from the obligations that they have freely entered into. It is now not open to them to

argue that the PG is conditional. Parties have no problem saying what they mean when they entered into the contract; do the plaintiffs have problem now meaning what they say?

[24] I find also that s 54(j) of the Specific Relief Act 1950 addresses this issue of when an injunction will be refused:

> (j) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the court.

[25] The fact that the plaintiffs have never the slightest doubt what the first defendant wanted is clearly borne out by the description of the PG as 'an approved, unconditional and irrevocable on-demand bank guarantee'. Reading English as it stands, those words must be given the ordinary and natural meaning ascribed to it by the dictates and demands of commerce. The approach taken by the Federal Court in interpreting performance guarantee or performance bond has been succinctly summarised in *Focal Asia Sdn Bhd & Anor v Raja Noraini binti Raja Datuk Nong Chik & Anor* [2009] 1 LNS 913 as follows:

> The Federal Court in *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163 drew a distinction between two types of performance bond: a conditional performance bond and an unconditional or 'on demand' performance bond. As for a *conditional* performance bond, the Federal Court held that it is a bond 'whereby the guarantor becomes liable upon proof of a breach of the terms of the principal contract by the principal and the beneficiary sustaining loss as a result' (at p 181 of the report). The *unconditional* or 'on demand' performance bond, on the other hand, refers to a bond 'which is so drafted that the guarantor becomes liable merely when a demand is made upon him by the beneficiary with no necessity for the beneficiary to prove any default on the part of the principal in the performance of the principal contract' (at p 181 of the report).

[26] Whether a bond is unconditional/'on demand' bond or a conditional one, is a matter essentially of construction and identifying the intention of the parties in a commercial setting. It is useful in this collection to be reminded of Lord Denning's statements in *Attica Sea Carriers Corporation v Ferrostaal Poseidon Bulk Reederai GMBH, The Puerto Buitrago* [1976] 1 Llyod's Rep 250 at p 5:

> The parties can, by clear words, provide that complete performance of the particular stipulation can be a conditional precedent: but, in the absence of clear words, the court look to see which of the rival interpretations gives the more reasonable result ... the fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it, the more necessary it is that

they shall make that intention abundantly clear (quoting in part Lord Reid in *Wickman v Schuler* [1974] AC 235). See also *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283; [1995] 1 MLJ 149 (decision of Peh Swee Chin J), as followed in *Bocotra Construction Pte Ltd & Ors v Attorney General (No 2)* [1995] 2 SLR 733 (a Singapore Court of Appeal decision). The underlying purpose of a performance bond is to provide security which is to be readily, promptly and assuredly realisable when the prescribed event occurs: (*Esal (Commodities) v Oriental Credit* [1985] Llyod's Law Rep 496). In this commercial setting it will be unreasonable to require liability to be dependent on a finding of fact that the principal has been in breach of contract. Whether there has been a breach of the principal contract is a matter to be decided between the immediate parties, which may very well be an outcome to be decided after litigation. As between the beneficiary of the bond/guarantee, which is unconditional on its wording, and the bank/insurance company issuing the bond on guarantee, the contractual intent has to be that the beneficiary has the right to demand payment merely by calling on the bond or guarantee without needing to prove breach. It may, however, be necessary to refer to the breach in the demand. In short, it depends on the wording of the particular bond or guarantee.

[27] I find therefore that there are no serious questions to be tried and on that score alone, the application for the injunction should be dismissed.

[28] However, in case I have been wrong in that, I shall venture to consider the second ground argued by the plaintiffs.

Whether there is fraud and unconscionability on the part of the first defendant in the contract such as to invalidate their call on the PG

[29] The first defendant submitted that the law on performance bond or performance guarantee injunction is quite well settled though there are some cases at the High Court level that do not seem to follow the high and binding authority of the Supreme Court in *Esso Petroleum Malaysia Inc v Kago Petroleun Sdn Bhd* [1996] 1 MLJ 149 and that of the Court of Appeal in *LEC Contractors (M) Sdn Bhd (formerly known as Lotteworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor* [2000] 3 MLJ 339; [2000] 3 AMR 2625. In *Esso Petroleum* it was held that:

(a) In relation to injunctions restraining the banks from making payment under a performance bond, such an injunction would only lie against the bank if and only if there was a fraud of which the bank had notice; and

(b) In relation to injunctions restraining the beneficiary from making a demand or receiving payment, the ordinary *American Cyanamid* principles would apply and it is very seldom that the 'balance of convenience' requirement will be fulfilled in such cases.

[30] The plaintiffs' counsel urged this court to follow the development of the law in Singapore where the test of unconscionability has been applied in granting an injunction against payment out of performance guarantee but our Court of Appeal in *LEC Contractors* case has rejected this test:

> First of all we wish to point out that the authorities we have referred above clearly indicated that *in order to justify any injunction to stop payment there must be clear evidence of fraud* on the part of the first defendant which comes to the knowledge of the second defendant. *Bad faith or unconscionable conduct by itself is not fraud*. (Emphasis added.)

[31] Not only am I bound by the doctrine of stare decisis in that a decision of a Court of Appeal is binding on me, it is also a decision that makes good business sense as parties in commerce and construction know what they are talking about and expecting when they ask for an 'unconditional, irrevocable on-demand guarantee'.

[32] Counsel for the first defendant drew the court's attention to the following cases where the fraud test has been applied to injunct payments from being made out under a performance bond or guarantee comprising of one Supreme Court decision, two Court of Appeal decisions, one High Court decision affirmed in the Court of Appeal and 14 other High Court decisions:

(a) *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 (SC);

(b) *LEC Contractors (M) Sdn Bhd (formerly known as Lotteworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor* [2000] 3 MLJ 339; [2000] 3 AMR 2625 (CA);

(c) *Cygal Bhd v Bandar Subang Sdn Bhd* [2004] 3 CLJ 67 (CA);

(d) *Luminous Construction Sdn Bhd v RHB Bank Bhd & Ors* [2010] MLJU 212; [2010] 1 LNS 219 (HC);

(e) *Pasukhas Construction Sdn Bhd & Anor v MTM Millenium Holdings Sdn Bhd & Anor* [2009] 8 MLJ 1; [2009] 6 CLJ 480 (HC), affirmed in the CA;

(f) *Focal Asia Sdn Bhd & Anor v Raja Noraini binti Raja Datuk Nong Chik & Anor* [2009] 1 LNS 913 (HC);

(g) *Hisniaga Jaya Sdn Bhd v Dua Masa Construction Sdn Bhd* [1986] 1 MLJ 245; [2009] 1 LNS 558 (HC);

(h) *Ekovest-KMZ-Dragages Sdn Bhd v HSBC Bank Malaysia Berhad & Anor* [2003] MLJU 364 (HC);

(i) *Nishimatsu-Corpro Construction (M) Sdn Bhd v Dorsett Regency Hotel (M) Sdn Bhd* [2001] MLJU 143 (HC);

(j) *HSH Engineering & Construction Sdn Bhd v Belton Properties Sdn Bhd & Anor* [2001] MLJU 85; [2001] 2 CLJ 186 (HC);

(k) *IJM Construction Sdn Bhd v Cleveland Development Sdn Bhd* [2002] 3 MLJ 516; [2001] 6 CLJ 220 (HC);

(l) *Kheng Bee Construction Sdn Bhd (280541-X) v Standard Warehousing Sdn Bhd (439814-M)* [2000] MLJU 767 (HC);

(m) *Transfield Projects (M) Sdn Bhd & Anor v Malaysian Airlines Systems Bhd* [2000] 7 MLJ 583; [1999] 4 CLJ 827;

(n) *Murni Builders Sdn Bhd v Legends Golf & Country Resort Bhd & Anor* [1999] MLJU 441 (HC);

(o) *Gemawan Bina Sdn Bhd lwn Ikatan Wirausaha Sdn Bhd* [1998] MLJU 310 (HC);

(p) *Kirames Sdn Bhd v Federal Land Development Authority* [1991] 2 MLJ 198 (HC);

(q) *Kejuruteraan Awam Cang Ceng (M) Sdn Bhd v Standard Chartered Bank* [1283] MD 2; [1991] 3 CLJ 2502 (HC); and

(r) *Patel Holdings Sdn Bhd v Estet Pekebun Kecil & Anor* [1989] 1 MLJ 190 (HC).

[33] Cases, and all at the High Court level that applied the unconscionability test are as follows:

(a) *Satriadesa Corporation Sdn Bhd v Tenaga Nasional Bhd* [2009] MLJU 1404; [2010] 4 CLJ 877 (HC);

(b) *Siemens Integra Transportation System Sdn Bhd & Anor v EKD Construction Sdn Bhd & Anor* [2003] MLJU 475 (HC);

(c) *Nafas Abadi Holdings Sdn Bhd v Putrajaya Holdings Sdn Bhd & Anor* [2004] MLJU 148 (HC);

(d) *Perkasa Duta Sdn Bhd v Perbadanan Kemajuan Negeri Selangor* [2002] MLJU 20; [2002] 2 CLJ 307 (HC);

(e) *Elcorp Resources Sdn Bhd & Anor v Perbadanan Putrajaya & Anor* [1998] MLJU 555; [1999] 1 CLJ 558 (HC);

(f) *The Radio & General Trading Co Sdn Bhd v Wayss & Freytag (M) Sdn Bhd* [1998] 1 MLJ 346 (HC);

(g) *Bains Harding (Malaysia) Sdn Bhd v Arab-Malaysian Merchant Bank & Ors* [1996] 1 MLJ 425 (HC); and

(h) *Hemis Interco BV Sdn Bhd v Syarikat Pembenaan Hashbudin (M) Sdn Bhd* [1986] 1 CLJ 562 (HC). A

[34] Has the 'fraud test' been satisfied for the court to grant the plaintiffs the injunction they sought against the defendants? The first defendant submitted that what have been touted as fraud do not come close to it and that the plaintiffs are trying to transform disputes in the contract into fraud on the plaintiffs. In *United Trading Corporations SA and Murray Clayton Ltd v Allied Arab Bank Ltd & Ors* [1985] 2 Lloyd's Report 554 it was held that: B

> If the court considers that on the material before it the only realistic inference to draw is that of fraud, then the seller would have made out a sufficient case of fraud. C

[35] The plaintiffs had referred to the following as proof of fraud:

(a) Concealment of the oil properties and characteristic of the real crude oil or representative blend of crude oil. Erroneous, false or misleading statement or representation on Blend 5A (different blend from the contractual Blend 2) and concealing the truth that Blend 5A would pose a high and significant risks of wax deposition to the facilities and pipeline. D

The first defendant's reply: The second plaintiff was only ever required to work with the crude oil set out in its contractual obligation and it has not shown any particularisation to support its position that it was required to perform its obligations other than in accordance with the contract. In any event nothing turns on it especially as Blend 5A crude properties is better than Blend 2 crude oil properties in contrast to the second plaintiff's claim. E F

(b) Disguising or camouflaging or falsely stating the introduction of hot water as 'load test' or 'stability test' when in truth and in reality, the introduction of hot water was a pre-heating of the pipeline as part of the first defendant's technical solution to overcome wax deposition problem which was overlooked by the first defendant's design consultant. G

The first defendant's reply: The hot water testing was necessary due to the second plaintiff's breaches of the contract by failing to design and submit commissioning procedures despite repeated requests by the first defendant. Further the second plaintiff did not produce an alternative method on how to make ready the pumping facilities. H

(c) Taking over physical control and possession of the completed pumping stations and using and operating them to export crude oil since August 2006.

The first defendant's reply: The first defendant was forced to carry out the necessary works as the second plaintiff had failed to honour their agreement to carry out readiness check and stability tests under an agreement reached on 20 May 2008 and under cl 42.2 of the contract. The first defendant was entitled to carry out such works under the contract as provided in cll 40.1 and 42.3. I

Clause 42.6 of the contract is clear that works carried out by the first defendant would not relieve the second plaintiff of their contractual obligation and that it would not constitute 'handing over'.

[36] Viewed dispassionately, the above allegations of fraud are more in the nature of disputes over interpretation of the contract and the material as adduced by affidavit evidence does not lend itself to the only reasonable inference of fraud.

[37] I find that the demand on the PG has been validly made and there was nothing forthcoming from the plaintiffs that they would be extending the PG pending negotiating. If the demand is not made the PG would have expired. Failure of the second plaintiff to renew the PG is a breach of its contractual obligations.

Whether knowledge of the fraud and unconscionability by the second defendant would justify an injunction restraining the second defendant from paying out

[38] The second defendant has entered an ordinary appearance. Their stand is basically neutral. They have not filed any affidavits to support or oppose the injunction prayed for. They will pay if there is no injunction restraining them from paying out. They will not pay if there is an injunction restraining them from paying out. Having found that there is no material before the court that lend itself to the only inference of fraud and that the test here is fraud and not unconscionable conduct with respect to a PG injunction, this question then has become irrelevant.

Whether the balance of convenience favours the plaintiffs' because irreparable damage and/or harm would be caused and the plaintiffs' reputation as a company would be damaged

[39] The plaintiffs submitted that if the injunction is not granted or the ad interim injunction is not continued, there will be irreparable damage whereby it cannot be compensated in monetary form because its commercial reputation as contractors in Malaysia and overseas will be damaged and the plaintiff's banks will probably withdraw and/or freeze the loans and credit facilities. The plaintiffs projects locally and overseas will be affected and they would suffer huge losses.

[40] The first defendant's contention is that it is trite law that this is compensable by damages. It pointed out that the plaintiffs have not in any way condescended to particulars of their financial position, other than divulging that they are making an application pursuant to s 176 of the Companies Act

1965 and at the same time simultaneously asserting that they have sufficient funds to meet any undertaking in damages that they have to give if the injunction were given. As rightly pointed out by the first defendant, no attempt was made at reconciling these seemingly inconsistent assertions.

[41] It is trite that the burden is on the plaintiffs to adduce evidence of irreparable harm. Nowhere is it stated that the payment out of the PG will cause the insolvency of the plaintiffs.

[42] The High Court in *Mayekawa MFG Co Ltd & Anor v Haisan & Sons Sdn Bhd & Ors* [2005] 1 LNS 325 when confronted with a similar scenario had this instructive comments to make:

> ... If the plaintiffs can be financially compensated, then an interlocutory injunction should not be granted. This test can be put in another way. If the damage to the plaintiffs is irreparable, then the plaintiffs cannot be financially compensated. However, in the case of *Evercrisp Snack Products (M) Sdn Bhd v Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297 it was held there must be evidence of irreparable damage to entitle the plaintiffs to interim relief.
>
> In this case, the plaintiffs through their managing director's affidavit have asserted that if an interim injunction is not granted the damage that the plaintiffs will suffer will be irreparable and cannot be quantified. Apart from merely making this assertion, the plaintiffs have not shown how they will suffer. Neither have the plaintiffs adduced any evidence of the nature of the irreparable damage. They have not explained whether the irreparable damage is financial (in which case, what would be the estimated amount?) or commercial, social, psychological or emotional. The plaintiffs have merely uttered the words 'irreparable harm' and expects this court to assume that it is an established fact. Irreparable damage must be proved and here the plaintiffs have not done so. If the irreparable damage is not proved, then there can be nothing that needs to be protected by interim relief.

[43] With respect to the plaintiffs' contention of damage to reputation we have the guidance from the case of *Transfield Projects (M) Sdn Bhd & Anor v Malaysian Airline Systems Bhd* [2000] 7 MLJ 583; [1999] 4 CLJ 827 where at p 842 it was held:

> In *Bocotra Construction Pte Ltd & Ors v Attorney General (No 2)* [1995] 2 SLR 733 Karthigesu JA has this to say (at p 747) on a similar contention raised:
>
> If 'damage to reputation' is accepted generally as a form of irreparable damage, then this can easily be invoked in every instance where performance bonds or bank guarantees had been issued. Rolle J himself confessed that should the plaintiff's ability to perform the contract be called in question, 'it is not difficult to infer that there will be damage to its reputation in the industry it operates'. We are not persuaded by the appellants on this count.

> We disagree in particular with the appellants' contention that it would be relevant to consider the unthinkable consequences for large and established companies such as the appellants if their reputations were to be called in question. The appellants went so far as to submit that any suggestion that there had been no performance while the dispute was still in the midst of arbitration would cast a slur on the appellants' reputation, such as to amount to some form of libel. This submission is, in our view, devoid of any possible justification. We do not see any reason why the courts should strive to uphold a presumption of infallibility on the appellant's part.
>
> I am in agreement with the views of the learned judge in the above case. To uphold such a contention would open the floodgates for parties who have submitted performance bonds under building contracts to invoke the same in every instance. The plaintiffs in the instant case have failed to show that if the defendant is not so injuncted, irreparable harm or damage would be caused to them and such harm or damage would place them in an irretrievable position incapable of remedy by way of damages.

[44] I find much force in the first defendant's argument that the balance of convenience is heavily tipped in favour of the first defendant as performance bonds are the lifeblood of commerce, a commercial bargain struck by both parties to provide for times of risk and one which the courts are reluctant to interfere. If authorities are needed, one can refer to the case of *Esso Petroleum* where at p 156 it was stated:

> Conventional wisdom has it that in the world of commerce, trustworthiness is a byword for doing business and a performance bond thus plays a crucial role causing more business to be formed and to be transacted and further at p 159:
>
> While considering other factors in conjunction with what has been stated above, there was a special one among them, ie performance bonds of the present sorts were involved here. A performance bond, like a pure on-demand guarantee in the instant appeal, has always occupied an important place in the national and international world of commerce. It will be remembered that Lord Diplock in the *American Cyamide* had alluded to special factors to be taken into consideration in the particular circumstances of individual cases. We therefore, in the end, found the balance of convenience tipped heavily against the seller, and we unanimously agreed that the interlocutory injunction granted ex parte and continued inter partes by the learned judge in favour of the seller, should be discharged, hence the appeal is allowed.

[45] The Court of Appeal in *LEC Contractors* at p 2645, had occasion to couch the coveted position of a performance guarantee in this fashion, adopting a passage from Kerr J in *RD Harbottle (Mercantile) Ltd & Anor v National Westminster Bank Ltd & Ors* [1977] 3 WLR 752 at p 761:

It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the lifeblood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations of the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise trust in international commerce could be irreparably damaged.

PRONOUNCEMENT

[46] Taking into consideration all the above factors and also the fact that the first defendant has no assets within jurisdiction and that it is an off-shore BVI company, I made the following orders.

[47] The ad interim injunction is hereby set aside.

[48] The inter parte application in encl 3 for the injunction is dismissed with costs to be taxed.

[49] The sum of US$18m in the performance guarantee is to be released by the second defendant to the first defendant's solicitors and the said sum is not to be released to the first defendant until and unless a counter performance guarantee is furnished by the first defendant in favour of the second plaintiff for the sum of US$18m to the satisfaction of the court which performance guarantee is to remain valid until the disposal of the arbitration between the second plaintiff and the first defendant by the handing down of a final award.

[50] In the event the net result of the award is in favour of the second plaintiff, then so much of the sum awarded as may be covered by the performance guarantee is to be paid to the second plaintiff.

[51] All payments made by the plaintiffs to the first defendant's solicitors pursuant to the order of this court on 30 June 2010 in dismissing the first defendant's application to set aside the ad interim injunction is to be repaid back to the plaintiffs' solicitors together with interests earned upon the first defendant's solicitors receiving the sum of US$18m from the second defendant.

POSTSCRIPT

[52] I must commend lead counsel for the plaintiffs/applicants Mr Tee Geok

Hock and lead counsel for the first defendant/respondent Mr Kamraj Nayagam for their in-depth research and industry they have brought into the preparation and presentation of their case, aided no doubt by their junior counsel. The documents run into volumes and so do the bundles of authorities. I hope I have done justice to their scholarly research by covering all major points raised in the determination of this dispute.

Application in encl 3 dismissed

Reported by Ashgar Ali Ali Mohamed